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Paper No. 10

HRW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sashco, Inc.

Serial No. 75/853,488

Timothy J. Martin and Mark H. Weygandt of Timothy J.
Martin, P.C. for Sashco, Inc.

Brian A. Rupp, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Simms, Wendel and Rogers, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Sashco, Inc. has filed an application to register the
mark CASCADE for a "coating used as water repellant for log
homes."¹

Registration has been finally refused under Section
2(d) on the ground of likelihood of confusion with the

¹ Serial No. 75/853,488, filed November 16, 1999, claiming a
first use date and a first use in commerce date of May 31, 1997.

marks CASCADE² and CASCADE 25³ which are registered by the same entity for "fiberglass laminated shingles"; the mark CASCADE CREST⁴ which is registered by a different entity for "wood paneling"; and the mark CASCADE BLUE⁵ which is registered by a third entity for "fluorescent dyes."

The refusal has been appealed and both applicant and the Examining Attorney have filed briefs.⁶ An oral hearing was not requested.

We make our determination of likelihood of confusion on the basis of those of the *du Pont*⁷ factors that are relevant in view of the evidence of record. Two key considerations in any *du Pont* analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods with which the marks are being used. See *Federated Foods, Inc. v. Fort Howard Paper*

² Registration No. 2,333,174, issued March 21, 2000.

³ Registration No. 2,273,038, issued August 24, 1999. A disclaimer has been made of the term "25."

⁴ Registration No. 1,687,884, issued May 19, 1992, Section 8 & 15 affidavits accepted and acknowledged, respectively.

⁵ Registration No. 1,571,495, issued December 19, 1989, first renewal. A disclaimer has been made of the term "BLUE."

⁶ As a preliminary matter we note that the Examining Attorney has objected to the material which applicant has attached to its brief, as untimely additional evidence. As applicant has pointed out, this material was earlier submitted in connection with applicant's response of October 18, 2000. Thus, the evidence was properly made of record and has been taken under consideration by the Board.

⁷ *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999).

Looking first to the marks involved here, we are guided by the well established principle that although the marks must be considered in their entirety, there is nothing improper, under appropriate circumstances, in giving more or less weight to a particular portion of a mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Moreover, although descriptive or disclaimed matter cannot be ignored in comparing the marks, it is also a fact that consumers are more likely to rely on the non-descriptive portion of a mark as an indication of source. See Hilson Research Inc. v. Society for Human Resource Management, 27 USPQ2d 1423 (TTAB 1993)

Applying these principles, we are in agreement with the Examining Attorney that not only is one of the registered marks identical to applicant's CASCADE mark, but also in two other of the registered marks, namely CASCADE 25 and CASCADE BLUE, the dominant term is CASCADE. Both the numeral 25 in CASCADE 25 and the word BLUE in CASCADE BLUE have been disclaimed, an acknowledgment by the registrants of the descriptiveness of these terms. Although applicant argues that a consumer may look to these terms as providing information about the products with

which the marks are being used, this does not make these disclaimed terms the dominant portions of the marks, as applicant argues. The dominant portion is that portion which points to the particular source of the goods and would be relied upon by consumers as such, not the portion which describes some feature of the goods and which may be equally applicable to similar goods from other sources. Insofar as the registered marks CASCADE, CASCADE 25 and CASCADE BLUE are concerned, we find the marks highly similar in overall commercial impression to applicant's mark CASCADE.

The same does not hold true, however, for the registered mark CASCADE CREST. While the Examining Attorney argues that purchasers would focus on the term CASCADE because it is the first word in the mark, the term CREST, which has not been shown to be descriptive or even suggestive when used in connection with "wood paneling," cannot be ignored. We agree with applicant that the addition of the word CREST to CASCADE results in a composite term having a substantially different sound, appearance and connotation than CASCADE alone. The overall commercial impression created by the registered mark CASCADE CREST differs from that created by the mark CASCADE alone.

Turning to the goods involved, we note that as a general principle, the issue of likelihood of confusion must be determined on the basis of the goods as identified in the application and in the cited registration(s). Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). It is not necessary that the goods of the applicant and the registrant(s) be similar or even competitive to support a holding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from, or are associated with, the same source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993) and the cases cited therein.

The Examining Attorney's basic position with respect to the goods of the cited registrations vis-à-vis the goods of applicant is that because the goods could be utilized in the same industry, presumably the home construction business, and could be encountered by the same purchasers, these purchasers might mistakenly believe that the goods emanate from a common source. The Examining Attorney

points to numerous third-party registrations of record as evidence that coatings are used on, and in the manufacture of, shingles, paneling and like goods. He further argues that since coatings are necessary for the maintenance of shingles and paneling, the goods are closely related, would be marketed together to the same consumers, and would be expected to come from the same source.

Applicant insists that water repellant coatings for log homes are a completely different category of goods from either fiberglass laminated shingles or wood paneling. Applicant argues that the Examining Attorney has failed to appreciate the distinction between an entity which provides both coatings and shingles or paneling and an entity that simply provides the coatings that may be used on the latter goods. Applicant argues that nothing in the evidence of record demonstrates that consumers would encounter applicant's goods under circumstances which would give rise to the mistaken belief that they come from the same source as fiberglass shingles or wood paneling. In fact, applicant argues, there appears to be a closer relationship between the shingles and wood paneling themselves, yet registrations for both types of goods bearing CASCADE-formative marks have been allowed to coexist on the register.

Insofar as the cited registration for fluorescent dyes is concerned, applicant has made of record pages from registrant's Web site showing that these dyes are in actuality used in biotech assays and related scientific processes. Even if the registration is given a broader interpretation as to field of use of the dyes, applicant argues that it is doubtful if consumers would encounter fluorescent dyes in the process of purchasing a water repellant coating for the exterior of a log home.

We find that the basic deficiency in the Examining Attorney's position lies in the lack of evidence that purchasers would have reason to believe that a water repellant coating for log homes such as applicant's would emanate from the same source as that of fiberglass laminated shingles, wood paneling or fluorescent dyes. While numerous third-party registrations have been made of record, the Examining Attorney has relied upon these registrations simply to demonstrate that coatings are in fact used on shingles and wood paneling. This is not the same as providing evidence that a single entity may produce and market both the coatings and the goods upon which these coatings are used.

Third-party registrations showing that the same mark has been registered by a single entity for the various

types of goods at issue may well be sufficient to suggest a common source for goods of these types. See *In re Albert Trostel & Sons Co.*, *supra*; *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). But the Examining Attorney has failed to point to any evidence of this nature in the many registrations he has made of record. At best, we find evidence of registration of the same mark for "asphalt shingles" and "asphalt roof coatings." This is clearly insufficient to demonstrate that a water repellant coating for log homes might originate from the same source as fiberglass laminated shingles.

It is true that we are bound by the broad identification of goods in the registration for "fluorescent dyes" and thus cannot narrow the use of these dyes to the scientific field, despite applicant's evidence showing such limitation in actual use of the mark for such goods. Nonetheless, that does not dictate a finding that purchasers of fluorescent dyes would have any reason to believe that water repellant coatings for log homes would originate from the same source. In fact, any such assumption is unsupported by evidence and would appear to lie beyond the realm of common sense.

Accordingly, we find that the Examining Attorney has failed to establish that a sufficient relationship exists

between the goods of applicant and those listed in the cited registrations, so as to result in the assumption by consumers of a common source for the goods, regardless of the fact that at least some of the marks used thereon are similar in commercial impression. Even if some of these goods may travel in the same channels of trade and be used at various points by members of the building industry or later in home maintenance, we have no evidence that these are the types of goods which might originate from the same source or that purchasers would have good reason to assume the same.

Decision: The refusal to register under Section 2(d) is reversed.

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